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4 UNITED STATES DISTRICT COURT  
5 NORTHERN DISTRICT OF CALIFORNIA

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7 GEERTE M. FRENKEN,

8 Plaintiff,

9 v.

10 CHRISTOPHER PERRY HUNTER,

11 Defendant.

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13 Pending before the Court is Defendant Christopher Perry Hunter's motion for summary  
14 judgment. Dkt. No. 41 ("Mot."). Defendant initially filed his motion on August 18, 2017, seeking  
15 to dismiss Plaintiff Geerte Freeken's complaint under Federal Rule of Civil Procedure ("Rule")  
16 12(b)(6). *Id.*; *see also* Dkt. No. 11, ("Compl."). On August 21, 2017, Plaintiff filed an opposition,  
17 including an "application to strike" Defendant's motion. Dkt. No. 48 ("Opp."). On September 8,  
18 2017, Defendant replied to Plaintiff's opposition and application to strike. Dkt. Nos. 63  
19 ("Reply"), 65.

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On September 28, 2017, the Court heard oral argument on the motion. At the hearing, the  
Court notified the parties of its intent to convert Defendant's dismissal motion into a motion for  
summary judgment. Dkt. No. 68.<sup>1</sup> The Court has reviewed the parties' additional materials, and

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23<sup>1</sup> Plaintiff's complaint and Defendant's motion rely on publicly filed court documents that are  
24 outside the pleadings. *See* Dkt. Nos. 11, 42 (requesting judicial notice of those documents). "If,  
25 on a motion under Rule 12(b)(6) . . . matters outside the pleadings are presented to and not  
excluded by the court, the motion must be treated as one for summary judgment under Rule 56.  
26 All parties must be given a reasonable opportunity to present all the material that is pertinent to the  
motion." Fed. R. Civ. P. 12(d); *Garaux v. Pulley*, 739 F.2d 437, 437 (1984) (holding that pro se  
27 litigants must be given "explicit notice" of the district court's intent to convert a Rule 12(b)(6)  
motion into a motion for summary judgment). The Court accordingly **GRANTS** Defendant's  
28 request for judicial notice of the court orders cited in the complaint and motion. *See* Dkt. Nos. 11,  
42; *Mir. v. Little Co. of Mary Hosp.*, 844 F.2d 646, 649 (9th Cir. 1988) (finding judicial notice

1 finds that it can consider the motion for summary judgment on the papers. *See id.*; Dkt. Nos. 69,  
2 70. The Court **GRANTS** Defendant's motion.

3 **I. BACKGROUND**

4 On May 31, 2017, Plaintiff, proceeding pro se, asserted three causes of action under the  
5 Hague Convention on Civil Aspects of International Child Abduction of 1980 ("the Convention")  
6 and 42 U.S.C. § 11603(b) of the Internal Child Abduction Remedies Act ("ICARA") for: (1)  
7 return of her minor child ("Child") from the United States to the Netherlands, (2) preliminary  
8 injunction preventing Defendant from removing Child from the Court's jurisdiction, and (3)  
9 monetary damages to recover expenditures necessitated by Defendant's allegedly wrongful  
10 detention of Child. Compl. ¶¶ 1, 6–30.

11 The basic facts are not in dispute. Plaintiff is the mother and Defendant is the uncle of  
12 Child. *Id.* ¶¶ 8–9. Child was born in 2004, in Lihue, Kauai. *Id.* ¶ 7, Ex. B. Child's father, David  
13 John Hunter ("Father"), is now deceased. *Id.* ¶¶ 10. Plaintiff is a citizen of the Netherlands, Child  
14 is a citizen of both the United States and the Netherlands, and Father was a resident of California.  
15 *Id.* ¶¶ 8–12.

16 On April 10, 2006, Plaintiff filed for divorce from Father in the Superior Court of  
17 California, Nevada County. Compl., Ex. L ¶ 5. Pursuant to a stipulation and order by that court  
18 for custody and/or visitation of children, Plaintiff and Father agreed Plaintiff could move to Texas  
19 with Child on or after June 1, 2006. *Id.* On June 21, 2010, the Nevada County Superior Court  
20 entered an order awarding the parties joint custody of Child, stating that Child's "habitual  
21 residence" was the United States. Dkt. No. 41-3 ("Reiter Decl."), Ex. A.

22 In 2012, Plaintiff took Child to the Netherlands without Father's consent. Reiter Decl. ¶ 7.  
23 Plaintiff did not respond to Father's requests for Plaintiff to return Child. *Id.* ¶ 8. In July 2013,  
24 Father initiated legal proceedings in a district court in the Netherlands, asserting claims under the  
25 Convention. *Id.* On July 23, 2013, the Dutch district court ruled that Child must be returned to  
26 the United States by no later than August 9, 2013. *Id.*, Reiter Decl., Ex. B. at 2 (certified  
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28 appropriate where the documents are publicly available and not subject to reasonable dispute).

1 translation). Plaintiff appealed. *Id.* The Dutch appellate court upheld the lower court’s decision  
2 and ordered the return of Child “to the place of her habitual residence in the United States of  
3 America” no later than September 7, 2013. Reiter Decl. ¶ 9, Ex. B at 6.

4 Dutch authorities located Plaintiff with Child in the Netherlands on or about April 22,  
5 2014. Reiter Decl. ¶ 11. Father, who was in the Netherlands at that time, returned with Child to  
6 the United States. *Id.* After Child returned to the United States, Father obtained “sole and  
7 physical custody” over Child pursuant to an order of the Marin County Superior Court. *Id.* ¶ 12;  
8 Compl., Ex. L ¶ 11. The Marin County Superior Court issued that order on November 4, 2014.  
9 Reiter Decl. ¶ 12. On December 16, 2014, the Marin County Superior Court entered a subsequent  
10 order stating in pertinent part that: “The minor’s country of habitual residence is California [sic].”  
11 Reiter Decl., Ex. C. On August 1, 2016, the Marin County Superior Court issued another order  
12 stating that Father and Child resided in California, and that “[t]he United States is the country of  
13 habitual residence of the child.” Reiter Decl. ¶ 14, Ex. D.

14 Father died on April 30, 2017. Reiter Decl. ¶ 15. On May 1, 2017, Child filed a petition in  
15 Marin County Superior Court to appoint Defendant as her guardian. *Id.* ¶ 16. Plaintiff opposed  
16 the petition. *Id.* ¶ 18; Compl., Ex. L. The Marin County Superior Court appointed Defendant as  
17 Child’s temporary guardian on May 4, 2017. *Id.* ¶ 20; Compl., Ex. E. Child has been domiciled  
18 in Marin County, California from April 22, 2014 to at least the time that Plaintiff filed her  
19 complaint on May 31, 2017. Compl. ¶ 11.

20 **II. SUMMARY JUDGMENT STANDARD**

21 Summary judgment is proper when a “movant shows that there is no genuine dispute as to  
22 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).  
23 A fact is “material” if it “might affect the outcome of the suit under the governing law.” *Anderson*  
24 *v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is “genuine” if there is evidence in the  
25 record sufficient for a reasonable trier of fact to decide in favor of the nonmoving party. *Id.* The  
26 Court views the inferences reasonably drawn from the materials in the record in the light most  
27 favorable to the nonmoving party, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S.  
28 574, 587–88 (1986), and “may not weigh the evidence or make credibility determinations,”

1        *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997), overruled on other grounds by *Shakur v.*  
2        *Schriro*, 514 F.3d 878, 884–85 (9th Cir. 2008).

3              The moving party bears both the ultimate burden of persuasion and the initial burden of  
4              producing those portions of the pleadings, discovery, and affidavits that show the absence of a  
5              genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the  
6              moving party will not bear the burden of proof on an issue at trial, it “must either produce  
7              evidence negating an essential element of the nonmoving party’s claim or defense or show that the  
8              nonmoving party does not have enough evidence of an essential element to carry its ultimate  
9              burden of persuasion at trial.” *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102  
10             (9th Cir. 2000). Where the moving party will bear the burden of proof on an issue at trial, it must  
11             also show that no reasonable trier of fact could not find in its favor. *Celotex Corp.*, 477 U.S. at  
12             325. In either case, the movant “may not require the nonmoving party to produce evidence  
13             supporting its claim or defense simply by saying that the nonmoving party has no such evidence.”  
14             *Nissan Fire & Marine Ins. Co.*, 210 F.3d at 1105. “If a moving party fails to carry its initial  
15             burden of production, the nonmoving party has no obligation to produce anything, even if the  
16             nonmoving party would have the ultimate burden of persuasion at trial.” *Id.* at 1102–03.

17             “If, however, a moving party carries its burden of production, the nonmoving party must  
18             produce evidence to support its claim or defense.” *Id.* at 1103. In doing so, the nonmoving party  
19             “must do more than simply show that there is some metaphysical doubt as to the material facts.”  
20             *Matsushita Elec. Indus. Co.*, 475 U.S. at 586. A nonmoving party must also “identify with  
21             reasonable particularity the evidence that precludes summary judgment.” *Keenan v. Allan*, 91  
22             F.3d 1275, 1279 (9th Cir. 1996). If a nonmoving party fails to produce evidence that supports its  
23             claim or defense, courts enter summary judgment in favor of the movant. *Celotex Corp.*, 477 U.S.  
24             at 323.

25        **III. DISCUSSION**

26             The Convention seeks to deter international child abductions by removing the primary  
27             motivation: forum shopping in custody disputes. *Mozes v. Mozes*, 239 F.3d 1067, 1070 (9th Cir.  
28             2001). Accordingly, “when a child who was habitually residing in one signatory state is

wrongfully removed to, or retained in, another, Article 12 provides that the latter state ‘shall order the return of the child forthwith.’” *Id.* To trigger this obligation, the removal or retention must be wrongful under Article 3. *Id.* The removal or retention is considered wrongful where:

- a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
- b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

Convention, Art. 3, 19 I.L.M. 1501, 1501 (1980).

In assessing the propriety of removal or retention under Article 3, the Court asks four questions:

- (1) When did the removal or retention at issue take place? (2) Immediately prior to the removal or retention, in which state was the child habitually resident? (3) Did the removal or retention breach the rights of custody attributed to the petitioner under the law of habitual residence? (4) Was the petitioner exercising those rights at the time of the removal or retention?

*Mozes*, 239 F.3d at 1070. Determination of “habitual residence” is “perhaps the most important inquiry under the Convention.” *Murphy v. Sloan*, 764 F.3d 1144, 1150 (9th Cir. 2014) (quotation marks omitted). Indeed, an adverse finding regarding habitual residence is dispositive of the petition. *See id.* at 1147, 1076 (affirming district court’s denial of petition to return child to Ireland because child was a habitual resident of the United States). In identifying a child’s habitual residence, the Court looks for the last “shared, settled intent of the parents and then asks whether there has been sufficient acclimatization of the child to trump this intent.” *Id.* at 1150.

Plaintiff’s claims fail under the four-step framework set forth in *Mozes*. According to Plaintiff, Defendant wrongfully retained child on May 1, 2017. Compl. ¶ 12. There is no dispute that Child was a habitual resident of California prior to that date. Plaintiff admits in her complaint that Child has resided in California since April 22, 2014. *Id.* ¶ 11. In her opposition, Plaintiff acknowledges that she and Father “agreed” in 2014 that Father would be Child’s primary caregiver “in the State of California.” Opp. at 4 (emphasis in original). Notably, courts on four different occasions—in both the United States and the Netherlands—have found Child to be a habitual resident of the United States. *See* Reiter Decl. ¶¶ 9, 13-14, Ex. B-D. And the Marin

1 County Superior Court found specifically that California is Child’s habitual residence. Reiter  
2 Decl. ¶ 13, Ex. C. As Defendant points out, *see* Mot. at 5, Plaintiff’s complaint not only fails to  
3 allege that Child’s habitual residence is the Netherlands, but also attaches documents compelling a  
4 contrary conclusion.

5 Under *Mozes*’s third step, the Court applies California law to determine whether  
6 Defendant’s retention of Child breached Plaintiff’s rights. It did not. Pursuant to the Marin  
7 County Superior Court’s order, Father had sole custody of child as of November 4, 2014. Reiter  
8 Decl. ¶ 12; Compl., Ex. L, ¶ 13. Following Father’s death on April 30, 2017, the Marin County  
9 Superior Court appointed Defendant as Child’s temporary guardian. *Id.* ¶ 20; Compl., Ex. E. That  
10 appointment occurred on May 4, 2016. *Id.* Plaintiff fails to identify any facts or authority that  
11 would disturb that appointment. *See* Mot. at 5. Though Plaintiff asserts that custody of Child  
12 reverted to Plaintiff upon Father’s death, she cites no applicable authority supporting her position.  
13 *See* Opp. at 4, 6–7. Rather, Plaintiff relies on two California state court decisions, decided  
14 respectively in 1928 and 1986, that pertain broadly to transfers of custody. *See id.* Neither case  
15 discusses the Convention or ICARA. Plaintiff’s reliance on the Fourth and Fourteenth  
16 Amendments is similarly unavailing; the Ninth Circuit has repeatedly stated that a district court  
17 “has authority to determine the merits of an abduction claim, but *not the merits of the underlying*  
18 *custody claim.*” *See, e.g., Shalit v. Coppe*, 182 F.3d 1124, 1128 (9th Cir. 1999) (emphasis in  
19 original). Thus, “[t]he court is to determine only whether the removal or retention of a child was  
20 wrongful under the law of the child’s habitual residence, and if so, to order the return of the child  
21 to the place of habitual residence for the court there to decide the merits of the custody dispute,  
22 unless the alleged abductor can establish one of a few defenses.” *Id.* (internal quotation omitted).  
23 Pursuant to the Marin County Superior Court’s custody and guardianship orders, Plaintiff has not  
24 shown that her custody rights have been breached.

25 Plaintiff asserts, without any citation, that a May 2, 2017 order of the Marin County  
26 Superior Court vacated all other orders of that court. Opp. at 7. It is unclear what order Plaintiff  
27 is referring to, and what other orders she claims were vacated. Setting aside this ambiguity, the  
28 Marin County Superior Court’s subsequent May 4, 2017 order, appointing Defendant as Child’s

1 guardian, is sufficient to establish the lawfulness of Defendant's retention.

2 Finally, the Court **DENIES** Plaintiff's motion to strike. *See id.* at 10. As the basis for her  
3 motion, Plaintiff asserts that "Defendant offers no arguments to this Court that hold any merits  
4 whatsoever." *Id.* For the reasons already set forth, the Court disagrees with Plaintiff's  
5 representation.

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7 **IV. CONCLUSION**

8 Defendant has met his burden to show that there is no genuine dispute of material fact as to  
9 Defendant's lawful retention of Child. The Court therefore **GRANTS** Defendant's motion. The  
10 clerk is directed to enter judgment in accordance with this order in favor of Defendant, and to  
11 close the case.

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**IT IS SO ORDERED.**

13 Dated: 3/29/2018

14   
15 HAYWOOD S. GILLIAM, JR.  
16 United States District Judge

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